

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KENNETH EUGENE LEHRER,

Plaintiff,

v.

TIM CONNELLY, *et al.*,

Defendants.

Case No. 2:11-cv-00735-LDG (RJJ)

ORDER

Kenneth Eugene Lehrer filed this action in United States District Court, Southern District of Texas. As alleged in the amended complaint, Jason G. Landess was an attorney and he and Tim Connelly were parties or involved in several different litigations occurring in Nevada and California, that they had retained Lehrer to provide services as an expert, but that they failed to pay him for the services he rendered. Landess and Connelly have filed an amended counterclaim against Lehrer, alleging claims against Lehrer for violating the Fair Debt Collection Practices Act, 15 U.S.C. §1692(e) (FDCPA), deceptive trade practices, abuse of process, civil conspiracy, concert of action, and aiding and abetting. Lehrer now moves for dismissal of all counterclaims (#81) for failure to state a claim, which motion Landess and Connelly oppose (#83). The Court will grant the motion.

1 Motion to Dismiss

2 Lehrer's motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6), challenges
3 whether the counterclaimants' countercomplaint states "a claim upon which relief can be
4 granted." In ruling upon this motion, the court is governed by the relaxed requirement of
5 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim
6 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a
7 plaintiff (including a counterclaimant) must allege sufficient factual matter, accepted as
8 true, "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*,
9 550 U.S. 544, 570 (2007). Nevertheless, while a complaint "does not need detailed factual
10 allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'
11 requires more than labels and conclusions, and a formulaic recitation of the elements of a
12 cause of action will not do." *Id.*, at 555 (citations omitted). In deciding whether the factual
13 allegations state a claim, the court accepts those allegations as true, as "Rule 12(b)(6)
14 does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual
15 allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s]
16 the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Group,*
17 *Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

18 However, bare, conclusory allegations, including legal allegations couched as
19 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. "[T]he tenet
20 that a court must accept as true all of the allegations contained in a complaint is
21 inapplicable to legal conclusions." *Ashcroft v. Iqbal* 556 U.S. ___, 129 S.Ct. 1937, 1949
22 (2009). "While legal conclusions can provide the framework of a complaint, they must be
23 supported by factual allegations." *Id.*, at 1950. Thus, this court considers the conclusory
24 statements in a complaint pursuant to their factual context.

25 To be plausible on its face, a claim must be more than merely possible or
26 conceivable. "[W]here the well-pleaded facts do not permit the court to infer more than the

1 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
2 pleader is entitled to relief.’ *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
3 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.
4 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
5 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

6 FDCPA Claim

7 The crux of Lehrer’s argument that the FDCPA claim should be dismissed is
8 straightforward: he is not a “debt collector” and he did not attempt to collect a “debt” as
9 those terms are defined in the FDCPA.

10 In response to whether Lehrer was attempting to collect a debt governed by the
11 FDCPA, the counterclaimants’ opposition adopts and incorporates their opposition to the
12 motion to dismiss of Jason Frazer and O’Donnell, Ferebee, Medley & Kewiser, P.C. (the
13 Texas lawyers). For the same reasons the Court rejected the counterclaimants’ argument
14 with respect to the Texas lawyers’ motion, the Court again rejects the argument. The
15 FDCPA governs and only applies to “any obligation or alleged obligation of a consumer to
16 pay money arising out of a transaction in which the money, property, insurance, or services
17 which are the subject of the transaction are primarily for personal, family, or household
18 purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. §
19 1692a(5).

20 The counterclaimants’ arguments, and their allegations in the countercomplaint, fail
21 to raise any inference that, as to Connelly, Lehrer’s services were primarily for his personal,
22 family, or household purposes.

23 Further, the counterclaimants allege facts in their countercomplaint that do not
24 merely preclude a plausible inference that the underlying obligation is governed by the
25 FDCPA, but require a finding as a matter of law that the underlying obligation is not
26 governed by the FDCPA. As alleged by the counterclaimants:

- 1 11. In 2002 a series of civil suits arose in Nevada relating to transactions
2 between Advanced Medical Products, Inc. ("AMP") and/or Landess and
3 Marilyn Miglin, Duke Miglin and/or Dr. Dennis Gordon. Four of those
4 suits were consolidated on or around 2006 into lead Case No.
5 A449091 in the Nevada District Court, Clark County, Nevada
6 (hereinafter the "Nevada litigation"). Those suits arose out of a
7 business transaction involving a novel medical devices [sic] for the
8 cosmetic treatment of spider veins known as the "Arachnophlebectomy
9 Needle" ("APN"), AMP's primary asset.
- 10 12. Landess is a commercial litigator who has actively practiced law in
11 Nevada for over 30 years. He took the lead in prosecuting and
12 defending various claims in the Nevada litigation. He was a named
13 plaintiff and Counterdefendant in that litigation. He was also AMP's
14 president and one of its largest shareholders.
- 15 13. A similar companion case was instituted in California by Western Medical
16 Devices, Inc. ("WMD"), a California corporation. WMD was a distributor for
17 the APN. Tim Connelly ("Connelly") was WMD's president (hereinafter the
18 "California litigation").
- 19 14. In March of 2002 the pivotal events giving rise to the Nevada and California
20 litigations occurred. That shareholder litigation revolved around the APN,
21 which by that time was a patented product in the United States. Some of the
22 important damages issues in those litigations involved the need for a forensic
23 economist to value the APN and calculate the lost profits from the collapse of
24 AMP and WMD due to the shareholder conflict. Landess also needed a
25 forensic economist to calculate his personal damages due to lost wages and
26 the destruction of his personal assets, such as a promissory note for
 \$125,000.

As alleged by the counterclaimants, the series of suits in Nevada "arose out of a business transaction involving a novel medical devices [sic] for the cosmetic treatment of spider veins known as the 'Arachnophlebectomy Needle' ('APN'), AMP's primary asset." Landess took the lead in prosecuting and defending the various claims. He was AMP's president and one of its largest shareholders. A companion case was instituted in California by a corporation, Western Medical Devices, Inc., as to whom Connelly was the president. Finally, the pivotal events giving rise to all this litigation, which occurred in March 2002, was "shareholder litigation [that] revolved around the APN, which by that time was a patented product in the United States." The counterclaimants' own allegations establish that Lehrer's services were not primarily for personal, family, or household purposes, but as an expert witness in a commercial and business dispute. The Court recognizes Landess's further allegation that he "also needed a forensic economist to

1 calculate his personal damages due to lost wages and the destruction of his personal
2 assets, such as a promissory note for \$125,000.” The allegation does not, however,
3 negate the fact that (as Landess himself alleged) the “suits arose out of a business
4 transaction.” That Landess suffered personal damages in the business dispute does not
5 transform the primary purpose of the suits, and the primary purpose for which Lehrer’s
6 services were used, from commercial or business into a primarily personal purpose. The
7 lawsuits arose out of a business transaction. Lehrer rendered his services to assist in the
8 litigation of suits concerning a business and commercial dispute. As the allegations of the
9 countercomplaint establish, as a matter of law, that the obligation incurred for Lehrer’s
10 services was not a debt governed by the FDCPA, dismissal of the FDCPA claim with
11 prejudice is appropriate.

12 In addition, dismissal would also be warranted because the counterclaimants’
13 opposition concedes that Lehrer is not a debt collector under the FDCPA, and the
14 counterclaimants have not directed this Court’s attention to any authority suggesting that a
15 non-debt collector can be held vicariously liable under the FDCPA. The only decision to
16 which the counterclaimants cite, *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507 (9th Cir. Ariz.
17 1994), is inapposite. In that decision, the Ninth Circuit recognized that a *debt collector* is
18 not shielded from liability for venue violations in actions filed by the debt collector’s
19 attorney. That the Ninth Circuit also referred to the debt collector as a client of the attorney
20 that filed the suit (which the debt collector was) does not suggest that every client of an
21 attorney is a debt collector, nor does it suggest that an attorney’s non-debt collector clients
22 are liable under the FDCPA. Accordingly, as Lehrer is not a debt collector, dismissal with
23 prejudice of the FDCPA claim against Lehrer is appropriate.

24 Remaining Claims

25 Lehrer argues that all of the remaining claims must be dismissed as they rest upon
26 the allegation that he violated the FDCPA. The counterclaimants assert that the claims are

1 sufficient to stand of their own accord. Having reviewed the arguments, the Court finds
2 that dismissal of the remaining claims is warranted.

3 The counterclaimants assert that they have stated a claim for abuse of process.
4 The elements of abuse of process are: (1) the defendant had an ulterior purpose in the
5 underlying lawsuit other than resolving a legal dispute, and (2) the defendant willfully and
6 improperly used the legal process to accomplish that purpose. *LaMantia v. Redisi*, 118
7 Nev. 27, 30-31, 38 P.3d 877, 880 (2002). As previously noted by this district, “Nevada
8 follows the rule, as does an overwhelming majority of states, that the mere filing of the
9 complaint is insufficient to establish the tort of abuse of process.” *Laxalt v. McClatchy*, 622
10 F.Supp. 737, 752 (D.C.Nev.1985). The allegations of the counterclaim and the
11 counterclaimants’ opposition are confusing as to which process they allege that Lehrer has
12 abused. The counterclaimants allege, in paragraph 79, that Lehrer is the prime mover and
13 engineer of a continuing scheme of abuse of process. They reference the “Krenek suit.”
14 The countercomplaint fails, however, to allege that Lehrer was a party to that action. The
15 countercomplaint also fails to allege that Connelly was a party to that litigation. At most,
16 the counterclaimants allege that Lehrer told Krenek lies that Krenek relied upon, without
17 investigation, to file a lawsuit that named Landess, among others, as a defendant, and that
18 Lehrer promised to provide Krenek not only with expert services in that litigation but also
19 with false affidavits. Absent from the countercomplaint, however, are any allegations
20 indicating that Lehrer improperly used a legal process in the Krenek suit against either
21 Landess or Connelly. At most, the counterclaimants allege that Landess “warned Krenek
22 that he would be committing a serious abuse of process if he continued to prosecute
23 Jimmerson.” The counterclaimants have not offered any argument that they have standing
24 to prosecute a claim of abuse of process that accrued as to Jimmerson.

1 The only other process alleged by the counterclaimants is the present complaint of
2 Lehrer, which Lehrer filed in Texas, and which was transferred to this Court for the
3 convenience of the defendants.

4 Referencing Lehrer's allegations regarding the obligation Lehrer seeks to collect, the
5 counterclaimants argue, as the ulterior purpose, that "[i]n essence, Lehrer has knowingly
6 *invented* a claim and is attempting to prosecute that claim in order to coerce a nuisance
7 settlement with Counterclaimants." Accepting this as the "ulterior purpose," the
8 counterclaimants have not alleged any act in connection with Lehrer's complaint which
9 permits a plausible inference that Lehrer has abused the legal process to accomplish that
10 ulterior purpose. The counterclaimants' allegations of "numerous improper events taking
11 place after the filing of the Krenek suit" are irrelevant to whether Lehrer has abused the
12 process predicated upon Lehrer's present complaint. A claim for abuse of process,
13 particularly one which rests upon an allegation that the complaint was filed for ulterior
14 purposes, does not rest upon unrelated improper acts, but upon improper acts in the
15 prosecution (or lack of prosecution) of the relevant process. See, *Laxalt*, 622 F.Supp. at
16 752 ("There is no allegation of abusive measures taken after the filing of the complaint,
17 such as minimal settlement offers or huge batteries of motions filed solely for the purpose
18 of coercing a settlement."). As stated in *Laxalt*, summarizing *Bull v. McCuskey*, 96 Nev.
19 706, 615 P.2d 957 (1980), "[t]he Nevada court clearly indicated the attorney abused the
20 process available to him by offering to settle the case for a minimal sum and by failing to
21 present proper evidence at trial." *Id.* Absent any allegation that Lehrer has engaged in any
22 improper act in prosecuting his present complaint, the counterclaimants have failed to state
23 a claim for abuse of process.

24 The counterclaimants assert that their Nevada deceptive trade practices claim
25 remains viable as, according to the countercomplaint, Lehrer has "used coercion, duress,
26 and intimidation in connection with the business transactions by misusing legal process as

1 described herein.” Given that the counterclaimants have failed to state a viable claim of
2 abuse of process, their deceptive trade practices claim necessarily fails, and must be
3 dismissed.

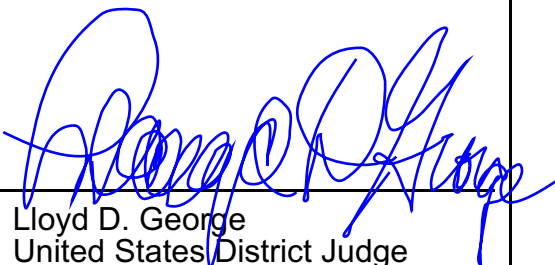
4 Similarly, counterclaimants argue that the civil conspiracy claim is not wholly
5 dependent on the viability of their FDCPA and deceptive trade practices claims, but that it
6 may rest upon the abuse of process claim. As counterclaimants have failed to allege a
7 viable abuse of process claim, or deceptive trade practices, and as the counterclaimants
8 cannot allege an FDCPA claim, dismissal of the civil conspiracy claim is appropriate.

9 The counterclaimants have not offered any argument that either their concert of
10 action claim or their aiding and abetting claim survive the dismissal of the FDCPA claim.
11 As each of those claims expressly rely upon the assertion that the initial filing of Lehrer’s
12 suit in Texas violated the FDCPA, which assertion is incorrect as a matter of law, the Court
13 will dismiss these claims with prejudice.

14 Accordingly, for good cause shown,

15 THE COURT **ORDERS** that Counterdefendant Kenneth Eugene Lehrer’s Motion to
16 Dismiss Jason Landess’ and Tim Connelly’s Amended Counterclaim (#81) is GRANTED as
17 follows: Counterclaims I (Fair Debt Collection Practices Act), V (Concert of Action), and VI
18 (Aiding and Abetting) are DISMISSED with prejudice; Counterclaims II (Deceptive Trade
19 Practices), III (Abuse of Process), and IV (Civil Conspiracy) are DISMISSED without
20 prejudice.

21
22 DATED this 27 day of March, 2012.

23
24 
25 Lloyd D. George
26 United States District Judge